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Supreme Court of the United States

October Term, 1976

CITY OF MADISON, JOINT SCHOOL DISTRICT NO. 8,
CITY OF MADISON, VILLAGES OF MAPLE BLUFF
AND SHOREWOOD HILLS, TOWNS OF MADISON,
BLOOMING GROVE, FITCHBURG AND BURKE
AND ITS AGENT THE BOARD OF EDUCATION,
CITY OF MADISON JOINT SCHOOL DISTRICT NO. 8

Appellants,

v.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION
AND MADISON TEACHERS INCORPORATED,

Appellees.

On Appeal from the Supreme Court of the State of Wisconsin

BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE

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BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE

This brief *amicus curiae* is filed on behalf of the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), a federation of 111 national and international unions having a total membership of approximately 14,000,000 men and women, with the consent of the parties as provided for in Rule 42(2) of this Court's Rules. Forty AFL-CIO unions bargain collectively in the public sector on behalf of approximately 3,000,000 public employees.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Wisconsin Supreme Court analyzed the constitutional issue which this Court has agreed to review in this case as follows:

> "The United States and Wisconsin Constitutions protect the rights of indivduals to speak and to petition their federal and state governments. But it is well established that these freedoms are not absolute * * *. The principle of exclusivity, by definition, forbids certain individuals from speaking certain things in certain contexts; the First Amendment rights of those persons are to that extent infringed. But the gravity of that evil was considered outweighed by the necessity to avoid the dangers attendant upon relative chaos in labor-management relations * * *. Now the question is whether [Mr. Holmquist's statement at the school board meeting] qualifies as bargaining and can, therefore, be restricted." (App. 188, 189,-190).

The appellants, and the various *amici curiae* appearing on their behalf, quite understandably have accepted this basic framework and proceeded to deal primarily with the last link alone: they maintain that, contrary to the Wisconsin Supreme Court's conclusions, Mr. Holmquist's statement of position at the School Board meeting, and the response thereto, cannot fairly be characterized as negotiating, or that the state interest in maintaining stable labor relations cannot override Mr. Holmquist's First Amendment rights. (See, e.g., Br. for Appellants at 35 et seq.; Br. on behalf of the Chamber of Commerce, at 4, 13, 15, 17 et seq.; Br. on behalf of the United States Conference of Mayors, at 23-27; Br. for National Right to Work Legal Defense Foundation, at 17-19, 19-21.)

We agree that if First Amendment rights are indeed at stake, the Wisconsin Supreme Court's conclusion that Mr. Holmquist's presentation was "bargaining" cannot end the constitutional inquiry, even if that Court's premises are accepted. (See, e.g., *NAACP v. Button,* 371 U.S. 415, 429.) And, we agree as well that significant First Amendment questions are raised by the holding that the School Board's allowing Mr. Holmquist to speak at a meeting open for expression to any citizen upon any subject relating to the schools constituted an unfair labor practice and, particularly, by the order issued by the Wisconsin Employment Relations Commission ("WERC"). (See Part III, *infra.*)

But, we do not agree that the questions posed can be sensibly resolved so long as the Wisconsin Supreme Court's assumption that because "the principle of exclusivity, by definition, forbids certain individuals from speaking certain context. * * * the First Amendment rights of those persons are to that extent infringed" (App. 189)[1] is left

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[1] Certain of the brief submitted in support of appellant's position state this assumption in even more sweeping terms, albeit with no more citation of authority. For example, one *amicus curiae* speaks of the "constitutional right [of public employees] to speak to their employer." (Br. for the Chamber of Commerce, at 20.) Another asserts that "Mr. Holmquist's appearance before and presentation to the Board of Education was the exercise of a right guaranteed by the First and Fourteenth Amendments." (Br. of the National Right to Work Legal Defense Foundation, at 9.) And, a third asserts that "any public interest in regulating labor relations must yield when such regulations restrict the right of individuals to address the government." (Br. of Wisconsin Association of School Boards, at 19.)

unchallenged. For this assumption, as we shall endeavor to show, is demonstrably false: the First Amendment does not grant citizens at large—or public employees in particular—a right of access to participate in the business meetings of government bodies. That, however, is not the end of the matter. As *Niemotko* v. *Maryland*, 340 U.S. 268, *Fowler* v. *Rhode Island*, 345 U.S. 67, and *Police Department* v. *Mosley*, 408 U.S. 92, demonstrate, once a state has determined to open a meeting of a government body to expressions of public opinion generally, *then* to distinguish among speakers on the basis of their viewpoint or their identity does implicate the "First Amendment/Equal Protection intersection" (*Mosley, supra*, 408 U.S. at 95 n. 3), and calls at least for a compelling state interest other than an interest in suppressing certain views to justify any denial of the permission to speak where that denial is other than the application of reasonable procedural rules. Applying this standard, the order approved by the Wisconsin Supreme Court cannot stand, and its conclusion that permitting Mr. Holmquist to speak was, without more, an unfair labor practice must fall as well. However, since it would on analysis be constitutional to declare an unfair labor practice if the permission to speak was part of a larger course of conduct by the School Board contrary to state labor policy, or to interpret state law so as to limit a public meeting agenda by excluding matters then in negotiation, the case should be remanded to the Wisconsin Supreme Court for decision in light of proper constitutional principles.

ARGUMENT

I

THE FIRST AMENDMENT DOES NOT GRANT CITIZENS GENERALLY, OR PUBLIC EMPLOYEES PARTICULARLY, A RIGHT OF ACCESS TO OR PARTICIPATION IN GOVERNMENT BUSINESS MEETINGS.

A. *Public employees and the First Amendment*

Before embarking upon a discussion of the First Amendment questions here, it may prove helpful to state briefly the lack of significance we see in the fact that the individual on whose behalf those questions are being raised[2] is a public employee. "Except when the interest of the state, as an employer, in promoting the efficiency of the public services it performs through its employees is overriding, teachers [and other public employees] may [not] constitutionally be compelled to relinquish the First Amendment rights they would otherwise enjoy as citizens to comment upon matters of public interest in connection with the operation of the public schools [or other government body] in which they work." (*Pickering* v. *Board of Education*,

[2] It is of some relevance to our later analysis that while, because of the circumstances here, the School Board does have standing to assert the First Amendment rights of its employees (see, e.g., *Pierce* v. *Society of Sisters*, 268 U.S. 510; *Singleton* v. *Wulff*, ... U.S. ....., 44 U.S.L.Wk. 5213, 5216) the Board has no First Amendment rights of its own entitled to recognition. Private citizens, to be sure, have a First Amendment right to receive information separate from that of the willing speaker or writer. (*Virginia Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, ... U.S. ....., 44 U.S.L.Wk. 4688.) But the basic purpose of the First Amendment is to prevent government encroachment upon *private* rights. Therefore, a subordinate governmental body cannot assert a right to receive information when the state legislature has determined the state interest to lie in *not* permitting direct citizen participation in that body's business meetings.

391 U.S. 563, 568.) This very statement of the principle that a public employee cannot ordinarily be compelled to relinquish rights he or she would otherwise enjoy as a condition of employment carries within itself an obverse principle: that a public employee does not *gain* any constitutional rights by virtue of his public employment. Thus, the First Amendment rights of public employees with regard to access to and participation in meetings of official bodies are at least not greater and may in limited circumstances be less than those enjoyed by citizens generally who have an interest in influencing a pending decision. (Cf., e.g., *Kelley* v. *Johnson*, —U.S. —, 44 U.S.L Wk. 4469.)

This principle, obvious though it may be, serves to illuminate the present case. For, to suggest that a teacher necessarily has a constitutional right to insist upon speaking directly to the school board upon a labor agreement under consideration, which right can be abridged only if the state interest in not hearing his views is compelling, is necessarily to suggest that every governmental body and official must support with a justification sufficient to subordinate a First Amendment right every determination to refuse to listen to the views of each interested citizen on each decision it makes.[3]

[3] The question of whether public hearings on questions of general importance are wise and ought to be legislatively commanded is, of course, an entirely separate matter. For example, certain federal statutes mandate hearings at which all interested citizens have a right to appear before a final decision can be reached on specific matters. (See, e.g., 23 U.S.C. § 128(a) (requiring a public hearing on Federal-aid highway projects). Cf. *Lathan* v. *Binegar*, 506 F.2d 677 (C.A. 9).) But such a hearing is not required by federal law whenever an agency engages in rulemaking which may affect individuals. (*United States* v. *Florida East Coast Rwy.*, 410 U.S. 224; *United States* v. *Allegheny Ludlum Steel Corp.*, 406 U.S. 742.) Congress is now considering legislation which would require most meetings of many federal agencies to be held in public, although participation by attending citizens would not necessarily be permitted. (See 122 Cong. Rec. H7863-H7902 (Daily Ed., July 28, 1976) (debate in the House of Representatives and passage of H.R. 11656, The Government in the Sunshine Act).) Wisconsin has already passed similar legislation, which has been interpreted to permit public comment upon public employee collective bargaining agreements once a tentative decision has been reached and bfore final adoption. (Wis. Stat § 66.77(c) (Supp. 1975); *Board of School Directors* v. *Wisconsin Employment Relations Commission*, 42 Wis. 2d 637, 168 N.W.2d 29 (1969).) The fact that both Congress and the state legislatures are now mandating more public access to government decision-making surely does not suggest that the direct right of access to government business meetings has a constitutional underpinning; if anything, it indicates the contrary.

Further, when the government proposes to take action against particular individuals, entirely separate constitutional protections—the Fifth and Fourteenth Amendment due process rights—sometimes compel an opportunity for an individual to present his views personally to a decision-maker. (See, e.g., *Goldberg* v. *Kelly*, 397 U.S. 254; *Arnett* v. *Kennedy*, 416 U.S. 134, 164 (Powell, J., concurring); *id.* at 172 (White, J., concurring).) No due process right has been asserted in this case, however; nor, so long as the requirements of the bill of attainder clause are observed, may due process rights be asserted on the ground that a legislative decision has been made without affected citizens being afforded a right to be heard. (*Bi-Metallic Investment Co.* v. *State Board of Equalization*, 239 U.S. 441.) Indeed, if the First Amendment commanded that the government provide an oral hearing to any citizen interested in its decisions, such persons could not be, as they have been heretofore, required to demonstrate both a deprivation of an interest in life, liberty or property and the necessity of an oral hearing to fair decision-making in the particular circumstances. (See, e.g., *Bishop* v. *Wood*, ... U.S. ....., 44 U.S.L.Wk. 4820; *Mathews* v. *Eldridge*, ... U.S. ....., 44 U.S.L.Wk. 4224; *Gerstein* v. *Pugh*, 420 U.S. 103.)

B. *Free speech and government meetings*

The question, then, is whether there is any heretofore undiscovered First Amendment right of citizens generally to speak directly to governmental bodies considering issues in which those citizens have an interest.[4] While this Court has never directly confronted this question, it has taken it to be true, in the words of Mr. Justice Holmes, that the "Constitution does not require all public acts to be done in town meeting or an assembly of the whole" (*Bi-Metallic Investment Co., supra,* 239 U.S. at 445); that "entry into the White House [is not] a First Amendment right" (*Zemel* v. *Rusk,* 381 U.S. 1, 17); and that this Court's "own conferences [and] the meetings of other official bodies gathered in executive session" may be closed to the public without implicating any constitutional rights whatever (*Branzburg* v. *Hayes,* 408 U.S. 665, 684. Cf. *Nebraska Press Ass'n.* v. *Stuart,* — U.S. —, —, 44 U.S.L. Wk. 51, 5165-5166, n. 21 (Brennan, J., concurring)).[5]

The basis for this understanding is simply stated. We begin with the premise that the First Amendment does not

[4] The right of citizens to use methods of communicating with government bodies other than direct oral speech is not involved in this case. As the WERC noted, Mr. Holmquist "could properly have presented his petition to the Board by means other than an appearance at an open Board meeting." (A-162.) (See *Pell* v. *Procunier,* 417 U.S. 817, 828, n. 6.)

[5] Since the Sixth Amendment protects the right to a "public trial," attempts to exclude citizens from attendance upon criminal trial court proceedings present special problems. (See *Nebraska Press Ass'n., supra,* 44 U.S.L.Wk. at 5160 (Brennan, J., concurring).) But, of course, it has never been suggested in that context that the attending members of the public have a right to participate in the trial.

command "that people who want to [present their] views have a constitutional right to do so whenever and however and wherever they please." (*Adderley* v. *Florida,* 385 U.S. 39, 48. Cf. *Cox* v. *Louisiana,* 379 U.S. 536, 544-55.) For, "[i]t is of course commonplace that the constitutional guarantee of free speech is a guarantee only against abridgement by government, federal or state." (*Hudgens* v. *NLRB,* — U.S. —, 44 U.S.L. Wk. 4281, 4283. See *CBS* v. *Democratic National Committee,* 412 U.S. 94.) And, "[t]he State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated." (*Adderley, supra,* 385 U.S. at 47. See also *Lehman* v. *City of Shaker Heights,* 418 U.S. 298, 302-303 (plurality opinion); *id.* at 312 (Brennan, J., dissenting); *Greer* v. *Spock,* — U.S. —, 44 U.S.L. Wk. 4380, 4383; *id.* at 4390 (Brennan, J., dissenting).) Thus, while certain publicly owned areas such as streets and parks are presumptively areas in which free expression is protected (*Hague* v. *CIO,* 307 U.S. 496, 515-516), the Constitution does not mandate that public ownship *alone* converts an area into a location to which access for purposes of expression is ordinarily protected. (*Lehman, supra; Greer, supra.*) Nor does the fact that members of the public are freely admitted to an area under government control for certain purposes mandate that *any* attempt to regulate expression in such areas must be shown to be necessary to an overriding state interest separate from any asserted interest in limiting communication. (*Lehman, supra; Greer, supra.*)

A survey of the few cases involving claimed protection of the First Amendment for activity *inside* a public building is instructive, for those cases indicate that the First Amendment does *not* embrace an access right to the inter-

nal workings of the government. (See *Tinker* v. *Des Moines School District*, 393 U.S. 503; *Southeastern Promotions* v. *Conrad*, 420 U.S. 546. Cf. *Brown* v. *Louisiana*, 383 U.S. 131, 142 (plurality opinion); *id.* at 145-147 (Brennan, J., concurring).) In *Southeastern Promotions*, the building involved was "designed for and dedicated to expressive activities" (420 U.S. at 555); in both *Tinker* and *Brown*, those asserting First Amendment claims had a right to be inside the building for certain purposes, other than the expression of views (393 U.S. at 512, n. 3),[6] and the protected activity in which they engaged was specifically found to be compatible with the purposes to which the building was otherwise dedicated. (Interestingly, in neither *Tinker* nor *Brown* did the protected activity involve speaking any words; and in both cases, it is quite possible that certain forms of verbal speech would have been found incompatible with the location and therefore permissibly banned.) Thus, the conclusion in these three cases that valid First Amendment claims were asserted stemmed from the principle that "[T]he truth is that * * * public places differ very much in their character, and before you could say whether a certain thing could be done in a certain place you would have to know the history of the particular

[6] For example, it seems clear that the *Tinker* case would have presented entirely different problems if persons who were neither employees nor students in the school had desired to walk the school halls with black armbands, even though the school had a rule, which it enforced, permitting only students and employees to use the corridors during school hours. Similarly, if it had been shown in *Brown* that only residents of the area served by the library were permitted to use the library, we would expect that the non-residents could be excluded even if their purpose in seeking entry was to protest segregation.

place." (*M'Ara* v. *Magistrates of Edinburgh* [1913] Sess. Cas. 1059, 1073-74; quoted in *Lehman, supra*, 418 U.S. at 302.)

This case does not, of course, involve directly the question of access to a government-controlled location. And, we are not aware of *any* decision of this Court dealing in the First Amendment context with the right of access to meetings of public officials rather than public places or, indeed, with access to government-controlled occasions or events rather than locations. But, we submit that the same principles govern: just as the government is not obliged by the Constitution to dedicate every publicly owned location even those open to citizens generally as a forum for speech, so it is not obliged by the Constitution to create a forum for speech by holding public meetings or admitting interested citizens to business meetings.

C. *The right to petition and government meetings*

The briefs urging reversal suggest that even if the free speech guarantee does not embrace a right to speak to govrnment bodies, the additional First Amendment guarantee of the right to petition the government may do so. We point out, first, that the implications of such a holding would be far reaching. For example, it seems clear in the present context that if the petition right included a right to insist upon speaking to a school board, this right could be exercised through a representative as well as personally. (See, e.g., *NAACP* v. *Button, supra; United Mine Workers* v. *Illinois Bar Association*, 389 U.S. 223.) Therefore, recognition of such a right would in essence hold the right to bargain collectively through a labor organization to be a constitutional guarantee rather than, as heretofore

assumed, a right granted only if the government agrees to engage in such bargaining with its employees through their chosen representative. (See, e.g., *Indianapolis Education Ass'n.* v. *Lewaller*, 72 LRRM 2071 (7th Cir., 1969);[7] *Hanover Township Federation of Teachers, Local 1954* v. *Hanover Community School Corp.*, 457 F.2d 456 (7th Cir., 1972) (Stevens, J.).)

The very language used in the First Amendment with regard to the right to communicate with the government—"petition for redress of grievances"—suggests that the right involved is *not* the right to command a personal audience, or to compel a discussion. Even those members of the Court disposed most expansively to read the petition guarantee have recognized that:

> "Conventional methods of petitioning may be, and often have been, shut off to large groups of our citizens. Legislators may turn deaf ears; formal complaints may be routed endlessly through a bureaucratic maze; courts may let the wheels of justice grind very slowly. Those who do not control television and radio, those who cannot afford to advertise in newspapers or circulate elaborate pamphlets may have only a more limited type of access to public officials." (*Adderley, supra*, 385 U.S. at 50 (Douglas, J., dissenting).)[8]

Similarly, in cases in which the petition right was suggested to have an impact perhaps broader than that which the free speech right alone would protect, the right asserted

[7] "There is no constitutional duty to bargain collectively with an exclusive bargaining agent. Such duty, when imposed, is imposed by statute." (*Id.* at 2072.)

[8] See, also, for a brief historical inquiry into the petition right, consistent with this analysis, *id.* at 49, n. 2.

was always the opportunity to use methods of communication or procedures otherwise available, not special accesss otherwise unavailable to speak directly to a government body.[9] (See, e.g., *NAACP* v. *Button, supra; Eastern Railroad Presidents Conf.* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127; *Boddie* v. *Connecticut*, 401 U.S. 371; *Pell* v. *Procunier, supra.*)

The suggestion th the petition right encompasses a right of direct access to and participation in government business meetings is not only without precedent, it is without logic. "Where a rule of conduct applies to more than a few people, it is impracticable that everyone should have a direct voice in its adoption. * * * There must be a limit to individual argument in such matters if government is to go on." (*Bi-Metallic Investment Co., supra*, 239 U.S. at 445.)[10] The government could be brought to a halt entirely were officials precluded from reaching any decision without hearing in person the views of, or discussing its implications with, interested citizens desiring to participate. Time alone dictates that governmental bodies and officials cannot

[9] In *Emporium Capwell Co.* v. *WACO*, 420 U.S. 50, 61, n. 12, this Court construed the language in § 9(a) of the National Labor Relations Act, protecting "the right * * * to present grievances" to an employer (29 U.S.C. § 159(a)) that parallels the First Amendment's petition right. (See *Hearings Before the Committee on Education and Labor* on S. 2926, 73rd Cong., 2d Sess. 273 (1934) (Statement by E. Witte).) The Court in *Emporium* commented that the § 9(a) statutory right does not "[make] it an unfair labor practice for an employer to refuse to entertain such a presentation."

[10] Mr. Justice Holmes added that the rights of individuals affected by government action "are protected in the only way that they can be in a complex society, by their power, immediate or remote, over those who make the rule." (*Id.*)

grant an audience to all interested citizens, or justify every exclusion with a well-tailored, compelling justification.

It will not suffice to suggest that the government can limit access to its business meetings by analogy to the "time, place and manner" cases (e.g., *Cox* v. *New Hampshire*, 312 U.S. 569; *Poulos* v. *New Hampshire*, 345 U.S. 395; *Cox* v. *Louisiana*, *supra*, 379 U.S. at 554-555), as long as it does so without reference to the views or identity of the person seeking access. Effective government, given time restraints particularly, necessarily requires that governmental bodies judge their own informational needs, within statutory constraints, and not be required to hear, for example, the first five people who show up on a given day, regardless of whether those individuals have any particular expertise, represent a group or only themselves, or wish to address an issue currently under consideration or one not on the body's schedule at the time.

The discriminations necessary in running the everyday business of a government often *are* content- or identity-based and properly so: a government body may want to discuss its budget with Citizen A because he is a financial expert but not with Citizen B, because he is not; it may agree to meet with persons opposing a present policy, but not feel it has time to hear a person supporting that policy, since it is quite aware of the arguments for continuance of the *status quo* but not fully informed of the problems that have been engendered.[11] The First Amendment

[11] This Court's exercise of its certiorari jurisdiction is illustrative. The Court decides whether or not to hear orally a certain case precisely because of its content—the importance assigned to the issues raised. And, it has never been suggested that the identity

should not, therefore, be stretched out of shape to deny government the discretion within the limits of applicable statutes to consult directly with Citizen A, but not Citizen B without the inhibition of having to consider whether there is a compelling reason not to listen to B. (Cf. *Lehman, supra; Greer, supra.*) [12]

of the litigants is an impermissible consideration, at least in the sense that a case with an impact on a given person, organization or business entity may have a social impact for that reason alone, regardless of the abstract importance of the issues. (Cf. *United States* v. *Nixon*, 418 U.S. 683.) Finally, while this Court ordinarily does not grant certiorari merely because a case has been wrongly decided, there is no question that it may do so, even if it has not heard other cases raising the same question because it agreed with the decisions below; thus, whether or not a party is heard orally can depend upon which side of an issue he is on. All of these decisions are made without affording the litigants an opportunity to present their case in person.

[12] We emphasize that just as this case raises no question regarding communication by means other than directly addressing a government body, see n. 4, *supra*, our analysis is also limited to that context. For example, attempts to punish mail communication with a government body or official would raise serious First Amendment petition problems, since that Amendment appears at least to protect *attempts* to gain access and consideration even though it does not command the government to listen. Once again, an example from this Court's procedures may be illustrative: Congress can, and has, mandated that this Court hear only some of the cases presented to it for consideration and has, as regards most cases, granted this Court wide discretion in determining which cases to hear. And, this Court may—indeed must—refuse even to consider certain cases for hearing, if procedural and jurisdictional prerequisites are not met. But surely to suggest that Congress could in addition preclude certain citizens from even presenting a written petition for consideration *whether* they are to be heard and *whether* they have met present requirements would present serious First Amendment petition problems, whatever other constitutional rights might

II

EXCLUSION OF CITIZENS FROM GOVERNMENT BUSINESS MEETINGS IS ORDINARILY CONSTITUTIONAL UNLESS ARBITRARY, CAPRICIOUS OR INVIDIOUS, BUT STRICT SCRUTINY, TAILORED TO THE NEEDS INHERENT IN A MEETING SITUATION, IS REQUIRED WHEN A MEETING IS EXPRESSLY DEDICATED TO THE AIRING OF THE VIEWS OF CITIZENS GENERALLY.

As we noted at the outset, the conclusion that First Amendment protections do not necessarily afford a citizen the right to address a meeting of a government body is not, of course, the end of the necessary constitutional inquiry. For, even when the First Amendment does not necessitate strict scrutiny, "[b]ecause state action exists, the policies and practices governing access * * * must not be arbitrary, capricious or invidious." (*Lehman, supra,* 418 U.S. at 303 (plurality opinion).) And, once the government *has* determined to dedicate an occasion or meeting to the expression of views by citizens generally, the First Amendment may then be implicated (*Southeastern Promotions, supra*) and necessitate that "discriminations among [speakers] be

in addition be implicated. (Cf. *NAACP* v. *Button, supra.*)

Somewhat similarly, it is far from clear that precisely the same principles govern access to individual government officials that govern access to government bodies as such. There is, to be sure, some congruence: a citizen presumably no more has a right to insist upon access to a Congressman's private office than he does to insist upon the opportunity to address the assembled House of Representatives. The question, however, whether Congress may by majority vote preclude or impede a citizen from meeting with a Congressman who is willing to—indeed, wants to—hear him out privately is quite different from the issue whether it may by majority vote exclude nonmember speakers from the floor although some Congressmen do not agree. For, if Congress cannot act as a body on the latter issue the majority would lose its protection against being compelled to be unwilling listeners.

carefully tailored to serve a substantial governmental interest" (*Mosley, supra,* 408 U.S. at 99).

A. *Government Business meetings generally, and bargaining sessions particularly*

The crux of our argument to this point is that insofar as a government body has not, either by its own decision or under statutory command, determined to open its decision-making processes or a portion thereof to public view and participation, the determination to confer with one person or group before reaching a decision but not with another implicates no protected interests and therefore must be justified only on "the relatively relaxed standard of reasonableness." (*City of Charlotte* v. *Local 660, Firefighters,* — U.S. —, 44 U.S.L. Wk. 4801, 4802.) [13]

Thus, the Wisconsin Supreme Court was quite correct in concluding that there is nothing unconstitutional about legislation commanding that in closed bargaining sessions a government body may admit, hear the views of, and respond to only the designated representatives of a union selected by the majority of its employees. But that Court was correct for the wrong reason. It deemed necessary an affirmative answer to the question whether the state's interest in the exclusive bargaining principle could survive the stringent test of *Dennis* v. *United States,* 341 U.S. 494. We express no view on its conclusion that this test has been

[13] Of course, this standard would not apply if the discrimination in question were subject to strict scrutiny under the equal protection clause for a reason other than any First Amendment considerations. For example, because racial classifications are necessarily suspect, a determination to permit white citizens to present their views in advance of a decision but not blacks is unlikely to pass constitutional muster.

met, other than to note that we believe the inquiry demands a more detailed analysis than that engaged in by the Wisconsin court. For, Wisconsin's policy is surely "a reasonable one with 'some basis in practical experience'." (*City of Charlotte, supra,* 44 U.S.L. Wk. at 4802.) And, that is all that is required.

As this Court has noted in cases dealing with parallel provisions of the NLRA, "orderly collective bargaining requires that the employer * * * not * * * go behind the designated representatives in order to bargain with the employees themselves * * *" (*Medo Photo Supply Corp.* v. *Labor Board,* 321 U.S. 678, 684). For, in the words of the drafters of that Act:

"The object of collective bargaining is the making of agreements that will stabilize business conditions and fix fair standards of working conditions. Since it is wellnigh universally recognized that it is practically impossible to apply two or more sets of agreements to one unit of workers at the same time, or to apply the terms of one agreement to only a portion of the workers in a single unit, the making of agreements is impracticable in the absence of majority rule. And by long experience, majority rule has been discovered best for employers as well as employees. Workers have found it impossible to approach their employers in a friendly spirit if they remained divided among themselves. * * * [And] majority rule carries the clear implication that employers shall not interfere with the practical application of the right of employees to bargain collectively through chosen representatives by bargaining with individuals or minority groups in their own behalf after representatives have been picked by the majority to represent all." (S. Rep. No. 573 on S.

1958, 74th Cong., 1st Sess., (1935), at 13.) [14]

The majority rule principle also serves the interest of employers. "Employers likewise, where majority rule has been given a trial of reasonable duration, have found it more conductive to harmonious labor relations to negotiate with representatives chosen by the majority than with numerous warring factions." (*Id.*) That principle reduces internal dissension among employees which can hamper productivity and assures that the employer is not faced with conflicting demands by opposing groups of employees. (See *Emporium Capwell, supra,* 420 U.S. at 67-68). The state, whose interest in public sector collective bargaining is both as an employer and as a government interested in the welfare of all its citizens, including public employees, could reasonably determine that its need for efficient operation of government bodies was best served by following a decades-old federal policy proven effective in the private sector.

The directive that only representatives of the majority union be admitted to and heard at negotiating sessions is the necessary consequence of the determination that government bodies may bargain collectively only with the exclusive representative of employees in each unit. For, if minority groups and individuals were admitted and heard, the divisiveness sought to be avoided could reappear, and, even if the ultimate agreement could be signed with only

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[14] See also the remarks of Senator Wagner noted in *Emporium Capwell, supra,* 420 U.S. at 62, n. 13: "Without [the exclusive bargaining principle] the phrase 'collective bargaining' is devoid of meaning, and the very few unfair employers are encouraged to divide their workers against themselves." (79 Cong. Rec. 2372 (1935).)

one group, many of the advantages of the exclusive bargaining system would consequently be lost. Thus, to the extent that it required government bodies to exclude employees other than representatives of the majority from closed bargaining sessions, the state was not acting arbitrarily, capriciously or invidiously but was, instead, acting in reasonable pursuit of a set of legitimate objectives. Since, in our view, no more stringent inquiry is involved, the Wisconsin Supreme Court was correct in concluding that the exclusive bargaining system, although it involves declining in some circumstances to hear the views of interested citizens (including public employees) is perfectly constitutional.

B. *Meetings which are public forums*

Not all meetings called by government bodies can, however, fairly be characterized as business meetings of the type we have been discussing. Rather, on some occasions the government may sponsor a public meeting which is "dedicated to expressive activities" (cf. *Southeastern Promotions, supra,* 420 U.S. at 555) by citizens generally. (See n. 3 *supra.*) The paradigm of such an occasion, and of a First Amendment forum, is the town meeting.

The Court has developed the principles governing distinctions among citizens seeking to use a government-controlled location once it has been determined that, for historical or other reasons, that location serves as a forum for the expression of ideas. These principles are, first, that "[s]elective exclusions from a public forum may not be based on content alone" (*Mosley, supra,* 408 U.S. at 96), and, second, that exclusions based on criteria other than content "must be tailored to serve a substantial governmental interest" (*id.* at 99).

We believe that the same general considerations must inform the standards for excluding particular speakers from a government-sponsored occasion or meeting expressly dedicated to hearing the views of citizens generally. But some caution is required in the extrapolation of these considerations from the location context to the context of an occasion or meeting. For, "speech has always been dependent on some commitment to order and etiquette." (Kalven, *The Concept of the Public Forum,* 1965 Sup. Ct. Rev. 1, 23). And, this need for order is much more pronounced, and is likely to support a more pervasive degree of regulation, in the meeting context than in the context of a street demonstration. That is, ordinarily the government's only legitimate interest in controlling a street demonstration is to assure that the activities which otherwise occur on the street are not interrupted. The government has no affirmative obligation to assure that the message sought to be pressed is effectively communicated; that is left to the speaker. But, where the government has dedicated an occasion precisely to a discussion of views, it has an interest, and perhaps an obligation, in promoting the effectiveness of that discussion, and consequently must be able to impose rules upon the convocation. (Cf. *Red Lion Broadcasting Co. v. FCC,* 395 U.S. 367, 386-389.) To illustrate:

> "Listen for a moment to Alexander Meiklejohn describing a town meeting:
>
> > 'In the town meeting the people of a community assemble to discuss and to act upon matters of public interest—roads, schools, poorhouses, health, external defense, and the like. Every man is free to come. They meet as political equals. Each has a right and a duty to think his own thoughts, to express

them, and to listen to the arguments of others. The basic principle is that the freedom of speech shall be unabridged. And yet the meeting cannot even be opened unless, by common consent, speech is abridged. A chairman or moderator is, or has been, chosen. He "calls the meeting to order." And the hush which follows that call is a clear indication that restrictions upon speech have been set up. The moderator assumes, or arranges, that in the conduct of the business, certain rules of order will be observed. * * * His business on its negative side is to abridge speech. For example, it is usually agreed that no one shall speak unless "recognized by the chair." Also, debaters must confine their remarks to "the question before the house." If one man "has the floor," no one else may interrupt him except as provided by the rules. * * * If a speaker wanders from the point at issue, if he is abusive or in other ways threatens to defeat the purpose of the meeting, he may be and should be declared "out of order." He must then stop speaking, at least in that way. And if he persists in breaking the rules, he may be "denied the floor" or, in the last resort, "thrown out" of the meeting. The town meeting, as it seeks for freedom of public discussion of public problems, would be wholly ineffectual unless speech were thus abridged . . .' " (Kalven, *The Concept of the Public Forum, supra*, at 24-25, quoting A. Meiklejohn, *Political Freedom*, 24-28 (1960).)

Thus, at least the no-content-discrimination rule cannot be carried over without modification to the meeting context. It is the nature of a meeting that *some* content discrimination is necessary to the very communication sought to be promoted; at the very least, a rule of relevance to the purposes of the meeting must be enforced so that those

seeking to express their views on those purposes will have the opportunity to do so.[15] While it is premature in light of the novelty of the issue to attempt to evolve a standard in this regard, we venture that it may be possible to draw a distinction between content-related rules related to procedural needs and those which, because they focus without justification on the identity of the speaker or the viewpoint taken on a particular issue properly before the meeting, raise the censorship dangers which are anathema in the First Amendment area.[16]

We also suspect that once the need for procedural regularity is recognized as a state interest supporting substantial "abridgement" of speech at such a meeting, the degree

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[15] A similar problem was recently presented in *Toward a Gayer Bicentennial Committee* v. *Rhode Island Bicentennial Foundation*, 44 U.S.L.Wk. 2577 (D. R.I., June 6, 1976), where a government commission refused to allow an organization to use a government building dedicated to bicentennial events. Judge Pettine recognized that the commission *could* limit access to the building on a content basis—by judging whether the exhibition was consistent with the purposes of the bicentennial celebration—but held that because the building was being used as a "limited public forum," the standards used in determining access on this basis must be clear, precise and even-handed.

[16] The degree of caution necessary in this area is shown by considering that even identity or viewpoint distinctions could be shown in some circumstances to be necessary to fulfilling the purposes of a meeting. For example, a traditional New England town meeting is limited to citizens of the town; non-citizens may have an interest in the subject matter but, we expect, it would not be unconstitutional to refuse to allow them to speak. Similarly, time constraints may be such that the chairman finds it necessary to limit the number of speakers on one side of an issue to assure that those on the other side are heard; in that instance, the right to speak depends to some degree on the viewpoint taken.

to which each regulation will be scrutinized to discover whether a less inclusive regulation would serve the purpose of keeping order and fostering effective communication may differ from the scrutiny appropriate in other contexts. It is the nature of such procedural rules that they are to some degree arbitrary; in their very arbitrariness resides their ability to preserve order, for there is then no room to argue about particular instances. For example, a rule that no speaker may speak for more than five minutes might well impede an individual from communicating all he wishes to say; and it may be that on any given occasion there are not more speakers than the time available. Nonetheless, to require proof that such a rule is necessary, and that a ten-minute limit would not suffice, would be, we expect, to disregard needs inherent in the meeting situation.

III

THE ORDER APPROVED, AND THE DECLARATION THAT SIMPLY PERMITTING SPEECH AT A PUBLIC MEETING IS AN UNFAIR LABOR PRACTICE, ARE UNCONSTITUTIONAL, BUT WISCONSIN MAY BE ABLE ON THIS RECORD TO DECLARE AN UNFAIR LABOR PRACTICE WHICH WOULD SURVIVE CONSTITUTIONAL SCRUTINY.

The foregoing is not meant to suggest that this Court prescribe in this case a code of rules applicable to the various public meeting situations which may arise. To the contrary, the novelty and sensitivity of the issues necessitate, in our view, that care be taken not to prejudge questions not directly before the Court.[17] On the facts of this case,

[17] For example, the question whether a given meeting is a business meeting, or a public meeting devoted to free expression, may not always be as clear as in this case.

however, we believe the considerations discussed clearly indicate: (1) that the order issued cannot stand; (2) that the way in which the Wisconsin Supreme Court concluded that in the precise circumstances an unfair labor practice occurred was impermissible; but (3) that on the record, Wisconsin perhaps *could* without violating any constitutional rights conclude that an unfair labor practice occurred in all the circumstances. The case should therefore be remanded to give the Wisconsin courts an opportunity to review the record and interpret the applicable State statutes consistently with the First Amendment.

A. *The order*

The order issued commands that the School Board:

> "1. Shall immediately cease and desist from permitting employees, other than representatives of Madison Teachers Inc., to appear and speak at meetings of the Board of Education, on matters subject to collective bargaining between it and Madison Teachers Inc." (App. 187.)

Given the principles enunciated above, this order is palpably unconstitutional. It would prevent a public employee from speaking even when the issue on which he wished to speak was on the meeting agenda, so that his remarks were relevant to the public discussion; and it would prevent him from speaking on matters "subject to collective bargaining" even if an agreement had been signed and no bargaining whatever was underway. Thus, the order on its face is neither a procedural or relevance rule applicable once the floor has been opened for comments, nor is it a command limiting the matters which are to be open for public discussion by removing subjects currently being

discussed in bargaining sessions.[18] Further, because some teachers—representatives of the majority union—are to be allowed to speak on subjects on which other teachers may not be heard, and because all teachers may apparently be heard on some subjects—those not "subject to collective bargaining"—the rule is not one describing the populace to whom the forum is open. Thus, the gravamen of the order is that regardless of any other circumstances, certain individuals may not speak at a meeting dedicated to expressions of views by citizens generally on certain subjects, even though they conform with all procedural rules, even though the subject upon which they wish to speak may be addressed by other speakers, and even though they are part of the "public" to which the forum is otherwise open. We can perceive no modification of the *Mosley* principles (408 U.S. at 95) tailored to the public meeting context which would permit this identity and content distinction, and the order must therefore be vacated. (*Gooding* v. *Wilson*, 405 U.S. 518.)

B. *The unfair labor practice analysis*

The question then arises whether on the facts of this case an order could be issued without infringing First Amendment rights. If not, the judgment must be reversed; if so, it ought to be remanded for further proceedings.

Our first conclusion is that on the facts from the record actually relied on by the Wisconsin Supreme Court, no

[18] In contrast, if the order had stated that matters currently being discussed in bargaining sessions must be excluded from the agenda entirely at public comment meetings, we would expect that the order would then merely be an exercise of the state's right to dictate which subjects are to be considered at a public meeting, and for the reasons we have given would be constitutional.

unfair labor practice may be declared. That Court has held that Wisconsin law requires an "open meeting [as] the necessary and final step in the 'negotiation' process between the school board and the majority teachers' union." (*Board of Sch. Directors of Milwaukee* v. *WERC*, *supra*, 42 Wis. at 653, 168 N.W.2d at 100.) In this case it declared that because of the circumstances, the meeting, *even though* it was a regular public meeting, "certainly was part of the negotiation process" (App. 192), and that "one need only read the Holmquist statement to see that [he] was in fact negotiating * * *" (App. 193). Thus, the Wisconsin Supreme Court did not determine that the meeting in question here *was* the open meeting required by state law before a tentative contract already agreed to by the union and the Board may become final;[19] *or* that the School Board's permitting Mr. Holmquist's speech was merely *part* of a course of conduct which was in derogation of the obligation to bargain collectively. Nor did the Wisconsin Court focus on any *response* of the Board to the speech as the reason for declaring the speech illegal.[20]

[19] Indeed, it is quite clear that a tentative agreement had *not* been reached at the time.

[20] In *School Directors*, *supra*, 42 Wis.2d at 654, 168 N.W.2d at 101, the Wisconsin Supreme Court mentioned that in some instances school board members respond to questions of or positions taken by speakers at public meetings, and that if speeches by minority teachers were permitted, such discussion might occur and constitute "bargaining." The simple answer to this concern is that since, whatever First Amendment rights to speak are involved, there is certainly no right to compel a response (and see p. 4 n. 2, *supra*), that Court, if its fear is responses from a school board, could forbid such responses in proper circumstances; but to forbid the speech itself is unnecessary to pretermit the danger sought to be avoided and therefore, on the *Mosley* standard, impermissible. (See 408 U.S. at 101.)

On our analysis, it may not be declared illegal for a citizen, and therefore for a public employee, simply to speak at a public meeting on a subject properly before that meeting. Since the Wisconsin Supreme Court did not recognize this, it did not proceed to determine what course it would take if circumstances *other* than the speech were shown which supported a finding that the speech was *part* of a course of conduct which constituted an unfair labor practice as a matter of state law.[21] Nor did it proceed to determine whether the Wisconsin public employee bargaining statute could best be harmonized with the state open meeting requirement by declaring that matters in the process of being negotiated be removed from the agenda of public meetings until a tentative agreement is reached.

This case should therefore be remanded to the Wisconsin Supreme Court for an inquiry into the two latter questions on the basis of state law. Surely no constitutional question would be raised by a finding that the Board had committed a state unfair labor practice by aiding and abetting Mr. Holmquist in his activities and thereby undermining the status of the exclusive bargaining representative.[22] The fact that these activities culminated in a speech would not deprive Wisconsin of the ability to declare the

[21] The trial court did go beyond the speech itself, and concluded that: "Thus, the board's conduct involved more than its permitting Holmquist to speak to it on fair-share. It involved conduct which could only have for its purpose the frustration of the rights of the majority." (App. 177.) However, the WERC seems to have focused on the speech alone (App. 133), and the Supreme Court, while quoting other portions of the trial court opinion, did not cite or approve its findings on other aspects of the situation, and expressly relied on the speech alone.

[22] We express no view on the question whether the record would support such a holding.

reception of the speech *part* of the illegal course of conduct. (*NLRB* v. *Gissel Packing Co.*, 395 U.S. 575, 616-620.) If such a violation were found, an order could be entered proscribing future similar conduct by the School Board, as long as that order did not command that public employees not be allowed to speak at general public meetings even if the School Board were not implicated in any way in the circumstances leading to the speech.

Similarly, as noted, *supra*, n. 18, we think it is constitutionally open to Wisconsin to interpret its public employee collective bargaining statute to preclude government bodies from placing matters under negotiation on the agenda of public comment sessions prior to reaching tentative agreement. The Wisconsin courts should be given the opportunity to consider whether, in light of the constitutional invalidity of the balance it has heretofore struck, it wishes to reinterpret state law in this manner.

CONCLUSION

For the reason stated above, the cases should be remanded to the Wisconsin Supreme Court for consideration whether in light of the constitutional constraints in this area a state unfair labor practice has occurred and, if so, to enter an appropriate, limited order.

Respectfully submitted,

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